UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 1221 (LMM)

MERRIAM-WEBSTER, INCORPORATED,

Plaintiff,

—v.—

RANDOM HOUSE, INC.,

Defendant.

MCKENNA, *D.J.*

MEMORANDUM AND ORDER

I.

Plaintiff Merriam-Webster, Incorporated ("M-W") moves for a preliminary injunction against the publication by defendant Random House, Inc. ("RH") of a dictionary the precise "title" of which is a matter of some dispute, but which bears on its title page and on its dust jacket the words "Random House Webster's College Dictionary." This dictionary will be referred to as "the RH dictionary." M-W publishes a dictionary which bears on its title page together with the preceding facing page and on its dust jacket the words "Webster's Ninth New Collegiate Dictionary." M-W claims that there is a substantial likelihood of confusion between the RH dictionary and the M-W dictionary, and that the publication of the for-

mer will cause it irreparable injury.[1] While the evidence and arguments offered by the parties have been wide-ranging, the crux of the dispute centers primarily on two aspects of the RH dictionary: first, the use by RH of the word "Webster's" *and* the word "College" in combination; and, second, the trade dress—most particularly the dust jacket—of the RH dictionary.

Delivery of copies of the RH dictionary to RH's customers, for sale to the public through bookstores, is scheduled to begin on April 4, 1991. RH seeks to make the RH dictionary available for sale during the "graduation" season, which, together with the "back-to-school" and Christmas seasons, is regarded as one of the times of year most advantageous for the sale of dictionaries of the size, scope and price of the M-W and RH dictionaries. RH has already taken orders for some 109,000 of the 300,000 copies of the first printing of the RH dictionary.[2]

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[1] The complaint alleges four claims: (1) for infringement of registered trademarks, in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1); (2) for violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) for common law unfair competition and trademark infringement; and (4) for trademark infringement, unfair competition and dilution of M-W's trademarks in violation of New York General Business Law § 368-d.

[2] On February 26, 1991, the Court denied M-W's motion for a temporary restraining order, sought on the basis that M-W would be harmed by RH taking orders which might otherwise have gone to M-W. The motion was denied on the ground that pre-distribution orders given to RH instead of M-W could be identified through discovery and recompensed by money damages, and in contemplation of a decision on the motion for a preliminary injunction prior to April 4, 1991, after which the harm to M-W, if likelihood of confusion were to be found, could be argued to be irreparable. An evidentiary hearing on the motion for a preliminary injunction was held, after expedited discovery, on March 5, 6, 7, 8 and 11, 1991. RH argues that the affidavits submitted by M-W on its motion should not be considered because they ere not formally offered in evidence at the hearing. The M-W affidavits are, however, received, it being the common practice that motions for a preliminary injunction are determined on affidavits and testimony taken in court.

For the reasons set forth below, the motion for a preliminary injunction is denied.

II.

M-W or a predecessor has published dictionaries having the words "Webster's" and "Collegiate" in their titles continuously since 1898. The predecessor, G.& C. Merriam Co., had purchased the rights to the work and name of the American lexicographer, Noah Webster, from his estate. Of nine editions published by M-W and its predecessor (1898, 1910, 1916, 1931, 1936, 1949, 1963, 1973 and 1983), all were entitled "Webster's Collegiate Dictionary" except three: the "Webster's Seventh New Collegiate Dictionary" (1963), the "Webster's New Collegiate Dictionary" (1973) and the "Webster's Ninth New Collegiate Dictionary" (1983), the latter the edition currently on the market.[3]

RH has published dictionaries of a size, scope and price competitive with the M-W dictionaries just identified since 1947, when it published "The American College Dictionary," which was followed by "The Random House Dictionary of the English Language" in 1968 and the "Random House College Dictionary, Revised Edition" in 1975, the latter the edition currently on the market.

Three other dictionaries comprise the principal competition to the M-W dictionary and the currently available "Random House College Dictionary, Revised Edition," which is to be superseded by the RH dictionary against which a preliminary injunction is sought: "Webster's New World Dictionary" (which bears the indication that it is the "Third College Edition"), published in 1988 by Simon & Schuster, Inc.; "The American Heritage Dictionary" (which bears the indication

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[3] M-W also publishes an unabridged dictionary, as does RH. It is clear that unabridged dictionaries of the size, scope and price of those published by M-W and RH do not compete with dictionaries of the size, scope and price of the abridged M-W and RH dictionaries at issue here, commonly called either "college" or "desk" dictionaries.

that it is the "Second College Edition"), published in 1982 by Houghton Mifflin Company; and Webster's II New Riverside University Dictionary," published in 1984, also by Houghton Mifflin Company.

The M-W dictionary, the RH dictionary and the three competitive dictionaries just mentioned are similar in size, scope and price, containing approximately between 155,000 and 180,000 entries, selling at retail for prices from $15.95 to $20.00, and being of comparable sizes.[4] All have hard covers.

RH argues that the range of dictionaries to be considered competitive to the M-W and RH dictionaries should include paper covered, pocket size, dictionaries. The argument, and the testimony on which it is based, is not convincing. RH's motivation, quite obviously, is to include, as a direct competitor of the M-W dictionary, "The New American Webster Handy College Dictionary," a successful paper covered, pocket size, dictionary, selling at retail for $3.95, because, although it contains in its title the work "Webster" *and* the word "College," M-W has never sought to enjoin its publication. The evidence adduced by RH, however, shows no more than that such small dictionaries "compete for the same consumer dollar" as dictionaries such as the M-W and RH dictionaries. The quoted phrase is simply too vague to be meaningful. Many things, not all of them dictionaries or even books, "compete for the same consumer dollar, " and neither that, nor the fact that both small, paper covered, dictionaries and dictionaries of the size, scope and price of the M-W and RH dictionaries may be found in the same section of some stores, supports the suggested inference that the average consumer looking for a dictionary is so unfocused in what he or she wants as to ignore the widely different natures and prices of the two kinds of product.

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[4] The M-W dictionary sells for $16.95 without, and for $17.95 with thumb indexing; the RH dictionary is to sell for $18.00 without, and $20.00 with, that feature. The M-W dictionary claims to have almost 160,000 entries; the RH dictionary more than 180,000.

M-W alleges two federal registrations of trademarks for its dictionaries: No. 172, 131, for the word "Collegiate," on August 21, 1923, under the Act of February 20, 1905[5]; and No. 1, 395, 653, for "Webster's Ninth New Collegiate Dictionary" enclosed in a circle, on June 3, 1986. M-W has spent substantial sums of money in the advertisement of at least the second of these marks. The M-W dictionary has been the subject of regular advertising in prominent magazines such as *The New Yorker*, *Newsweek* and *Time*, the advertising generally presenting a photograph of the front of the M-W dictionary with the dust jacket on. M-W also advertises in specialized publications directed to librarians, schools, office product dealers and book sellers.

The M-W dictionary is the most successful of the five dictionaries identified above as competitive, and has appeared on the *New York Times* weekly best seller list 195 times.

III.

The principal issue, both on M-W's claim for infringement of its registered marks and on its claims for unfair competition, is whether the RH dictionary "is likely to confuse consumers as to the source of the product." *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986). " 'Likelihood of confusion' is the basic test of both common law trademark infringement and federal statutory trademark infringement." 2 McCarthy, *Trademarks and Unfair Competition*, (2d ed.), 1984, supp. 1989, at 42. (Footnotes omitted).

The classic framework for analyzing the issue is consideration of the factors set forth by Judge Friendly in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F2d 492 (2d Cir.), *cert. denied* 368 U.S. 820 (1961).

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[5] RH points out that this registration was not republished pursuant to Section 12(c) of the Lanham Act, 15 U.S.C. § 1062(c), and argues that it is, as a result, not incontestible. As will appear below, the issue of contestibility need not be decided.

> Where the products are different, the prior owner's chance of success is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers. Even this extensive catalogue does not exhaust the possibilities—the court may have to take still other variables into account.

287 F.2d at 495. (Citation omitted.)[6]

The Strength of M-W's Mark

At the outset, it should be noted that M-W does not claim that it has any exclusive right to the word "Webster's" alone or to the word "College" alone as applied to dictionaries. "If Random House wanted to call its new work the *Random House College Dictionary*, *Random House Webster's Dictionary* or *Webster's Random House Dictionary* we would have no objection and this suit would not have been brought." Plaintiff's Reply Mem. at 5-6. M-W's position is that it is entitled to protect the combination "Webster's Collegiate," and that the combination "Webster's College," used on the RH dictionary, is likely to be confused with "Webster's Collegiate."

RH contends that both "Webster's" and "Collegiate," as applied to dictionaries, have become generic terms, that is terms "which refer to the genus or class of which the product is a species, and are not entitled to protection even with proof of secondary meaning, i.e., proof that the public has come to

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[6] Although *Polaroid* concerned products that were different, the factors set forth by Judge Friendly have come to be used as well in cases in which the products are substantially the same and in direct competition. *See, e.g., Lois Sportswear, supra* (pocket stitching on two manufacturers' jeans).

associate the term with a particular source." *PaperCutter, Inc. v. Fay's Drug Co., Inc.*, 900 F.2d 558, 561-562 (2d Cir. 1990), citing *Abercrombie & Fitch Co. v. Hunting World. Inc.*, 537 F.2d 4, 9-11 (2d Cir. 1976), in which Judge Friendly set out, in ascending order of entitlement to protection, and explained, the spectrum of the categories of terms—generic, descriptive, suggestive, and arbitrary or fanciful—involved in trademark disputes.

RH has not shown that "Webster's is a generic term for dictionaries. It fits better within the definition of "descriptive terms," those "which convey an immediate idea of some characteristic or attribute of the product and are entitled to protection with proof of secondary meaning." *PaperCutter, supra*, at 562. "Webster's," however, does not have a secondary meaning. The multitude of dictionaries from different sources, all bearing the word "Webster's," introduced into evidence is sufficient proof of that.

Similarly, RH has not shown that "collegiate," as applied to dictionaries, is generic. The very few instances of the word's use in connection with dictionaries other than the M-W dictionary (or its predecessors) discovered by RH's expert lexicographer are too weak a foundation for such a finding. Whether or not "collegiate," considered as a descriptive term as applied to dictionaries has, standing alone, acquired secondary meaning, is a difficult question, which, however, in light of M-W's position and the fact that RH has not used the word, need not be decided.

The status of the combination "Webster's Collegiate" is more to the point. On the record made by the parties,[7] the Court accepts, for purposes of the present motion, M-W's position that "Webster's" and "Collegiate," as used in combination by M-W, have acquired secondary meaning. The evidence adduced by M-W "relating to the nature and extent of the public exposure achieved by the designation, including volume of sales, length of time of use, and advertising and

[7] Which, given the timing of the hearing called for by the RH distribution schedule, could not include survey evidence.

other promotional efforts, with commercial success, rather than the amount of expenditures, being the likely measure," *PaperCutter*, *supra*, at 564 (citations omitted), support an inference of a secondary meaning by which the combination "Webster's Collegiate" indicates M-W as the source of the dictionary. Further, the record contains specific evidence of "brand name" recognition of the M-W "Webster's Collegiate" dictionaries.

It needs to be added in support of such a conclusion that the dust jacket of the M-W dictionary, reflecting the mark as registered (No. 1, 395, 653), but in color, is visually distinctive. The cover of the dust jacket shows the title "Webster's Ninth New Collegiate Dictionary," all of the words in the same type in dark blue, on a white circular field (just inside the circumference of which is a dark blue circular line), against a red background. This motif (referred to at the hearing as a "bullseye") has been used on previous M-W dictionaries, and is used as well on other M-W products including its unabridged dictionary and the "Webster's Collegiate Thesaurus" (in this latter case, however, the background is yellow). The words "A Merriam-Webster" appear on the dust jacket immediately above the "bullseye," in a type resembling script, followed by the symbol "R" within a circle. The wide use of the "bullseye" motif on M-W's publication is a strong source identifier.

Consideration of the strength of the senior user's mark, however, cannot, by itself, resolve any trademark dispute.

The Degree of Similarity Between the Two Marks

Considering, for the moment, only the words used, it is M-W's position that (granting RH the right to use "Webster's" or "College" in other contexts) the combination "Webster's College" is confusingly similar to "Webster's Collegiate." That there is a similarity between "College" and "Collegiate" is certain; that there are differences is equally certain. The meanings of the words can, in some usages, be substantially identical; their sounds are similar, although "Collegiate," as

an adjective connoting something like "pertaining to college life," has an old-fashioned flavor; and, for what it is worth, "Collegiate" has one, or two, more syllables. It cannot be disregarded, however, that, just like the word "Webster's," the word "college" is available for use to all publishers, and is in fact used on the "Webster's New World Dictionary" and "The American Heritage Dictionary" insofar as they are respectively identified as the "Third College Edition" and "Second College Edition." The evidence adduced at the hearing established that the phrase "college dictionary" is a descriptive term, denoting a hard covered abridged dictionary of the size and scope of the M-W and RH dictionaries and their competitors, and that it is without secondary meaning.

The issue of the similarity of the phrases "Webster's College" and "Webster's Collegiate" cannot, however, be viewed in the abstract. It is "the general impression conveyed to the purchasing public by the respective marks that is at issue. *C.L.A.S.S. Promotions, Inc. v. D.S. Magazines, Inc.*, 753 F.2d 14, 18 (2d Cir. 1985). A prospective purchaser of a "college" dictionary is, in almost all cases, going to see the competing products among which he or she is to choose. The evidence showed that, in larger bookstores, at least, dictionaries are shrink-wrapped, which assures that the dust jackets remain on nd intact.[8] Even in smaller stores, it is a fair assumption that the books for sale will have dust jackets on them.

A comparison of the fronts of the dust jackets of the M-W and RH dictionaries reveals some similarities, but significant differences as well. The background colors of both are red, but that is also true of "Webster's New World Dictionary" and "Webster's II New Riverside University Dictionary." About a third of the bottom of the front of the dust jacket of the M-W and RH dictionaries contains editorial matter promoting features of the dictionary, as is the case with the just-mentioned competitors. The principal, and distinctive, feature of

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[8] Where shrink-wrapped books are available for purchases, typically one copy not shrink-wrapped is available for perusal.

the front of the M-W dictionary, its title in the "bullseye," has been described above.

The front of the dust jacket of the RH dictionary bears, on six separate lines, (i) the stylized drawing of a house, used by RH on a number of its publications, including its unabridged dictionary, then the words (ii) "Random," (iii) "House," (iv) "Webster's (v) "College," and (vi) "Dictionary," the first three lines in black, the last three in white. The words other than "Webster's" are printed in capital letters, "Webster's" with a capital W and lower case letters. "Webster's" is in larger type than the other words, and the type, while not identical to that used for the same word on the cover of the M-W dust jacket, is quite similar to it,[9] as is also the type used for the same word on "Webster's New World Dictionary." "Random House" is in much larger type than that used for "A Merriam-Webster" on the M-W dictionary.

One feature each of the M-W and RH dictionaries leads the Court to find that there is not a likelihood of confusion warranting the issuance of a preliminary injunction notwithstanding such similarities as there are: the distinctive "bullseye" motif of the M-W dictionary, on the one hand, and the strong RH "house mark"—its name together with the drawing of a house—, on the other. The use of a house mark is clearly a relevant consideration in determining whether there is likelihood of confusion. *See, McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1134 (2d Cir. 1979).

There is no evidence to support the suggestion that RH put its house mark on the RH dictionary in order that the house mark might be strengthened by an association in the minds of confused customers with the M-W dictionary. *Cf. American Home Products v. Johnson Chemical Co.*, 589 F.2d 103, 107 (2d Cir. 19078). The evidence tends to show, on the contrary, that RH placed its house mark on the front of the dust jacket of the RH dictionary because it believes that correct identification of the source of that dictionary will assist sales. It is

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[9] M-W uses a type called "Trump Medieval," RH one called "Goudy." While RH's expert explained the differences between the two in considerable detail, it is the similar overall impression that counts.

significant, as well, in this connection, that RH is not an obscure newcomer, but a well-known publisher, one, moreover, that has been publishing dictionaries for some time.

M-W suggests that the number of mergers and acquisitions in the publishing world in recent years supports a finding of likelihood of confusion. The argument is to the effect that, a consumer seeing "Webster's College" on the RH dictionary, and having some familiarity with M-W's "Webster's Collegiate" line, will think that there is now some sort of connection between M-W and RH, and that M-W in some way sponsors the RH dictionary. The Court finds this argument unconvincing. In the first place, although the publishing professionals involved in this case may be familiar with the merger and acquisition activity referred to, it is highly unlikely that the vast majority of potential purchasers of dictionaries are (or, if they have heard of it, give it a thought). Secondly, those potential consumers will, in fact, be confronted with the two dictionaries, each distinct upon even the briefest examination, and each identifying a different source, in the actual marketplace.

The spine of the dust jacket of the RH dictionary, considered in isolation, could possibly lead to confusion. It bears the world "Webster's" in large type, in white, vertically down the spine, just as does the spine of the dust jacket of the M-W dictionary. "Random House" (with the house design) appears in smaller type, in black, horizontally at the top of the spine "College Dictionary" similarly at the bottom. The M-W dictionary has its title, in small type, in white, horizontally at the top, a trademark—the initials NW in a wreath—and "Merriam Webster," both in white, horizontally at the bottom.

While confusion could occur if a prospective purchaser looked only at the spine, it is unlikely that many, if any at all, would choose a dictionary from a shelf without seeing its front at least, if not actually looking into the volume. The in-store display stand which RH will make available to bookstores will, it is true, present RH dictionaries stacked, so as to show the books' spines. The stand itself, however, prominently shows the name "Random House" and the RH house

design. Furthermore, the prominent feature of the spine, in both cases, is the word "Webster's" alone, in which M-W claims no exclusive right.

Proximity of the Products and Bridging the Gap

The products, of course, are the same and compete directly, and, as a result, there is no issue as to whether it is likely that the senior user will bridge the gap.

Actual confusion

No evidence of actual confusion was presented, the RH dictionary not yet being on the market for consumers, and only recently in the case of booksellers. In these circumstances, a negative inference against M-W because of the lack of such evidence will not be drawn. *Hasbro, Inc. v. Lanard Toys, Ltd.*, 858 F.2d 70, 78 (2d Cir. 1988).

The Reciprocal of Defendant's Good Faith, the Quality of Defendant's Product and the Sophistication of Buyers

There is no question but that RH deliberately chose to add "Webster's" to the name of its new dictionary to increase sales. Sales of "The Random House College Dictionary, Second Edition" have been, RH admits, disappointing. An in-store test of sales of that dictionary in a dust jacket bearing its correct title, against the same dictionary with a dust jacket bearing the title "The Random House Webster's College Dictionary" (not identical, however, to the dust jacket of the RH dictionary at issue), showed, to RH's satisfaction, that the addition of the word "Webster's" would increase sales. Since use of the word "Webster's" on dictionaries is not the exclusive right of any publisher, RH cannot be found to have acted in bad faith in adopting it to increase sales. Nor does the evidence show that RH used the word "College" together with "Webster's" in order to cause consumers to confuse the RH dictionary with the M-W dictionary. RH has previously used the word "College" on dictionaries, and, as pointed out above, the word is descriptive and without secondary meaning. Nor

does the fact that RH may have considered, before publication, less distinctive variants of the formal "title" of its dictionary, or its trade dress, lead to the conclusion that an injunction should issue. The consideration of such variants is consistent with the give-and-take between a publisher's editorial, art and sales personnel. And, in any event, it is the impression of the product actually put on the market on the consumer, that is, ultimately, the decisive question.

As the court pointed out in *Hasbro, Inc. v. Lanard Toys, Ltd., supra*, the factor of the quality of the defendant's product has come to represent two problems: that of the inferior product thought, through confusion, to be the superior, so that sales of the latter suffer; and that of products of equal quality, in which case there may be more likelihood of confusion. 858 F.2d at 78. Here, there is no evidence that the RH dictionary is an inferior product. Such differences as it has in comparison with the M-W dictionary—there was evidence, for instance, that M-W lists meanings of a word in an historical order, while RH does so in order of the commonness of different usages—are all legitimate lexicographical or publishing options. The second difficulty assumes a source of confusion other than that products are of equal quality. As is clear from what is said above, the Court finds that the M-W and RH dictionaries are sufficiently distinct in their overall impression that they are not likely to be confused.

Neither side presented evidence from which any precise findings as to the kinds of people who purchase "college" or "desk" dictionaries can be made. They are, no doubt, bought by (or for) high school and college students, but are surely purchased by many other categories of consumers as well, whether for use in offices or homes. About all that can be said is that it is likely that purchasers of dictionaries are at least as "sophisticated," and probably, in general, more so, than the range of consumers who purchase, say, breath mints, *Beech-Nut, Inc. v. Warner-Lambert, Inc.*, 480 F.2d 801 (2d Cir. 1973), or jeans, *Lois Sportswear, supra*. Book distributors and retailers ordering books are not likely at all to be confused,

since they must give their orders to a particular publisher (and pay that publisher).

* * *

Putting all of the above together, the Court cannot find that M-W has succeeded in showing that it is likely to succeed in the end on its claim of likelihood of confusion. And, if, short of that, it has raised questions going to the merits sufficiently serious to make them a fair ground for litigation, the balance of hardships does not tip *decidedly* toward it. It will, no doubt, without the benefit of an injunction, lose some sales as a result of competition from the RH dictionary. But RH, enjoined, will not only lose sales, but suffer damage to its goodwill when it fails to deliver dictionaries ordered for the "graduation season."

In view of the conclusion reached above on other grounds, RH's defense of laches on the part of M-W need not be reached.

IV.

In view of the confidential materials offered in evidence and referred to by the parties in their briefs, this Memorandum and Order is filed under seal. The parties will advise the Court in writing within 7 days of the date hereof whether it should remain under seal, citing specifically the bases for such a conclusion. Failing that, it will be unsealed.

The motion for a preliminary injunction is denied.

Dated: New York, New York
March 27, 1991

SO ORDERED.

/s/ LAWRENCE M. MCKENNA
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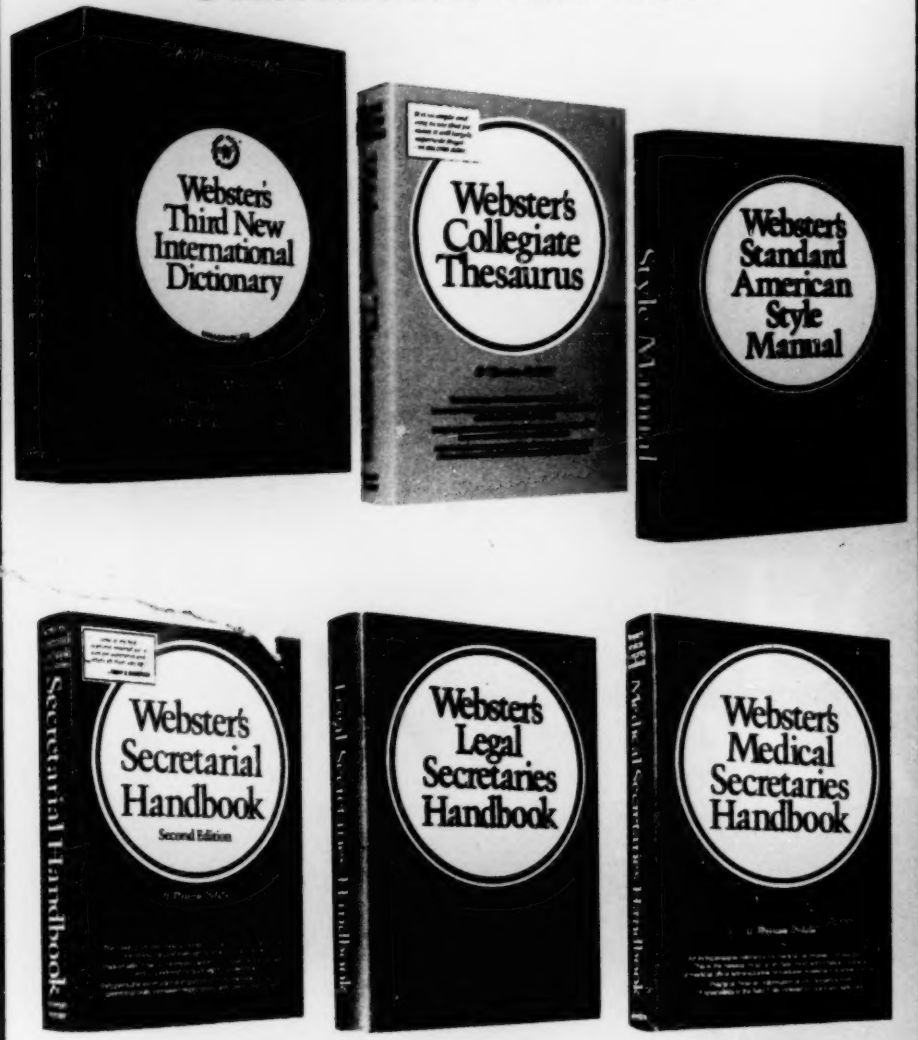

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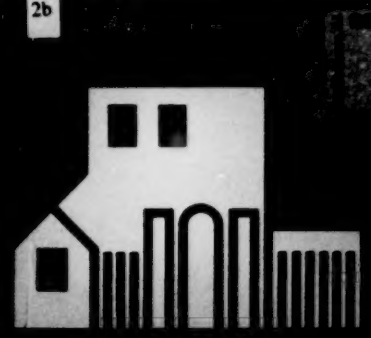

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Excerpt From Trial Testimony of Donald F. Miller—September 30, 1991

[921] The back or versa, as we call, it is simply less important than what you are seeing here; the spine and the front of the jacket.

Q. In your advertising, is the, and promotion of the Webster's Ninth New Collegiate, is the front of the book, or the face of the book promoted?

A. Yes.

Q. Is the spine of the book promoted?

A. Yes, it is.

Q. May I ask you what, in your view, and to your understanding, is the relative advertising of the spine and the face of the book as you understand it?

A. We always, we are always displaying the face of the book. The spine of the book, perhaps, about 50 percent of the time.

Q. Now I show you Plaintiff's Exhibit—

THE COURT: Just to keep good order here, are you offering 7 A and 10 A? They are not in the book.

MR. FILARDI: Yes, your Honor. These are actual promotion materials, not for demonstrative purposes. If it convenient, we will just offer pictures of these but these are the promotional items that the witness testified about.

THE COURT: You want to substitute pictures for them?

MR. FILARDI: Rather than—we will have these

Excerpts From Trial Testimony of Robery Sydney Albert—October 16, 1991

[2813] MR. FILARDI: Sorry.

A. You have to understand in the retail business, especially when you are talking about dictionaries, it is what we call a space product. Whatever you can buy for the best price and what is the newest and what you can get the best deal on, basically, when it comes to dictionaries is what you buy the most of.

So the selling—your selling points are if somebody was to walk into my store and said I need a dictionary, what do I sell them, and I would show them what I have, and I would be more apt to lean towards whatever I got a better price on, and also the other selling point is what's the newest. Everybody wants something that's up to date. You don't want something that's ten years old, you don't want something that's five years old, you want to be current.

So you lean towards whatever is current and whatever you got the best price on.

Q. So based on your 14 years of experience as a bookstore owner, did you conclude anything about the way customers purchase dictionaries?

A. My own conclusion? I think people were looking for somebody else to make the decision for them. The only time I have ever seen anybody compare dictionaries, and it happened once in 14 years that I was selling them, they [2814] would open two dictionaries, they would look at the definitions of the same word in both dictionaries, and whichever one they felt had a better definition, that's the one they bought.

No one that I know of has ever read a book on how to buy a dictionary, has ever looked at a comparison chart as to which one was better than the next one. It is like they don't have time to sit and study that.

Q. So besides the one instance that you just described, would a customer accept your recommendation?

A. Yes.

Q. And you would recommend the newest?

A. I would always recommend the newest.

MS. GOLDBARD: One second, your Honor.

(Pause)

MS. GOLDBARD: No further questions.

MR. FILARDI: Thank you, your Honor.

CROSS-EXAMINATION:
BY MR. FILARDI:

Q. My name is Ed Filardi. I represent Random House—I represent Merriam-Webster.

MR. FILARDI: I have been away for a few days, your Honor.

MR. ROSENTHAL: Your Honor, could we have a conference on this? I thought I was representing—

[2818] chart, and I tell you, Mr. Albert, that the jacket from Defendant's Exhibit 2 appears on the top of this chart and Defendant's Exhibit 109 appears on the bottom.

Are you familiar with the changing of the jacket during the course of the sales of Defendant's Exhibit 2 or Defendant's Exhibit 109? Were you advised of that?

A. No.

Q. Do you recall that after this lawsuit was instituted that there were changes made in the jacket to the new Random House book?

A. I don't know anything about that.

Q. Okay. Would I be correct in stating that whether you are selling Defendant's Exhibit 2, sir, or Defendant's Exhibit 109,

that the spine on the face of the book are really used as the selling tools for the book from the jacket standpoint?

A. True.

Q. Would I be correct in stating that—we had a number of exhibits and I don't wish to get into them in any detail, but that a time came when the promotional literature was changed to reflect a new title?

A. Correct.

Q. And that new title was what, sir?

A. Random House Webster's College Dictionary.

Q. Okay. Do you recall whether—what the title